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KOO HOCK CHUM & ANOR

v.

UNITED OVERSEAS BANK (M) BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02(IM)-864-2004]

C

26 NOVEMBER 2008

COMPANY LAW: *Members' rights - Shareholders - Right to sue for wrong done to company - Action in tort - Applicable principles - Whether cause of action must be independent of and separate from company's cause*

D *of action - Whether loss suffered must be separate and distinct from that suffered by company*

The appellants had charged a certain property to the respondent bank to secure a loan for a company ('Sri Palmar') of which they

E were the shareholders. Sri Palmar defaulted in the repayment and the bank foreclosed the security, instituted proceedings and obtained judgment against the appellants. The bank then commenced bankruptcy proceedings against the appellants, obtained an order for substituted service of the bankruptcy notice

F and subsequently had the notice published in the newspaper. The appellants alleged that the bank, in applying for and obtaining the order for substituted service, had relied on a false affidavit, and in the circumstances claimed damages for torts of abuse of process and malicious falsehood. It was the appellants' case that they had

G suffered damage because as a result of the bank's action they and Sri Palmar had been blacklisted by financial institutions. The bank retorted by applying to strike the suit on grounds, firstly, that the appellants lacked standing to sue because the damage, if any, was suffered by Sri Palmar, and secondly because the action was time-

H barred. Acceding to these arguments, the High Court struck out the appellants' action whereupon the appellants appealed.

Held (dismissing appeal and affirming the High Court)
Per Gopal Sri Ram JCA delivering the judgment of the court:

I

(1) The applicable principles are that a shareholder may only sue if he has a cause of action independent from any that his company may have, and further that, he must suffer a loss

separate and distinct from that suffered by the company caused by the defendant's breach of a duty independently owed to him *(Johnson v. Gore Wood & Co (a firm))*. These propositions however do not apply here because no wrong was done by the bank to the appellants which adversely impacted upon their returns from Sri Palmar. It is not the appellants' case that Sri Palmar was making profits before the obtaining of the substituted service order and publication of the bankruptcy notice in question and that it suffered losses after these events. The loss identified in the statement of claim is purely an inability on the part of Sri Palmar to undertake a certain project for want of finance resulting in a loss. Based on established principles, the "loss" suffered by Sri Palmar is its loss and not the appellants'. The loss claimed is thus too remote and hence irrecoverable by the appellants. (paras 3 & 5)

(2) For the purposes of the tort of malicious falsehood, time begins to run from the date of the publication of the falsehood. Here, publication took place on 8 June 1993 and accordingly the time limited to bring an action expired not later than 8 June 1999. Similarly, the tort of abuse of process is committed when the abuse takes place. (para 6)

(3) There is material on record that confirms that the appellants were aware of the advertisements as long ago as 18 June 1993. Yet they did not make a search of the court's process in the present instance. The time limited to bring an action based on the tort would on the facts here have expired not later than 18 June 1999. Yet the writ was only filed on 27 June 2003. The action in respect of both torts was therefore time barred. (para 6)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah menggadai suatu hartanah kepada bank responden untuk mendapatkan pinjaman untuk sebuah syarikat ('Sri Palmar') di mana mereka merupakan pemegang sahamnya. Sri Palmar gagal membuat pembayaran balik dan bank telah menghalang tebus sekuriti, memulakan prosiding dan memperoleh penghakiman terhadap perayu-perayu. Bank kemudian memulakan prosiding kebankrapan terhadap perayu-perayu, memperoleh perintah penyampaian gantian bagi notis kebankrapan dan seterusnya menyiarkan notis tersebut di akhbar. Perayu-perayu

mendakwa bahawa bank, dalam memperoleh perintah penyampaian gantian, telah bergantung kepada afidavit palsu, dan dengan demikian telah menuntut gantirugi berdasarkan tort penyalahgunaan proses dan pemalsuan jahat. Adalah menjadi kes perayu-perayu bahawa mereka menanggung kerugian kerena mereka dan Sri Palmar telah disenarai-hitam oleh institusi-institusi kewangan akibat dari tindakan bank di sini. Bank membalas dengan memohon untuk membatalkan guaman atas alasan, pertama, bahawa perayu-perayu tidak berkompeten untuk mendakwa kerana kerugian, jika pun wujud, adalah ditanggung oleh Sri Palmar, dan kedua kerana guaman telah dihalang had masa. Bersetuju dengan hujah-hujah ini Mahkamah Tinggi membatalkan tindakan perayu-perayu dan perayu-perayu merayu.

Diputuskan (menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Prinsip yang terpakai adalah bahawa seseorang pemegang saham hanya boleh mendakwa jika dia mempunyai kausa tindakan lain yang terasing dari kausa tindakan yang mungkin dimiliki oleh syarikatnya, dan lagi, beliau hendaklah mengalami satu kerugian yang berasingan dan terpisah dari apa yang ditanggung oleh syarikat dan yang bersebab dari kemungkiran tanggungjawab defendan terhadap dirinya sendiri *(Johnson v. Gore Wood & Co (a firm))*. Proposisi-proposisi ini bagaimanapun tidak terpakai di sini kerana tiada kesalahan telah dilakukan oleh bank terhadap perayu-perayu yang menjejaskan perolehan perayu-perayu dari Sri Palmar. Bukanlah menjadi kes perayu-perayu bahawa Sri Palmar telah menjana keuntungan sebelum perintah penyampaian gantian diperolehi atau sebelum penyiaran notis kebankrapan dibuat dan bahawa ia telah menanggung kerugian selepas peristiwa-peristiwa ini. Kerugian yang dikatakan di dalam penyata tuntutan hanyalah semata-mata kegagalan Sri Palmar untuk menjalankan projek tertentu kerana ketiadaan biaya yang membawa kepada kerugiannya. Berdasarkan prinsip-prinsip mantap, "kerugian" yang dialami Sri Palmar adalah kerugian syarikat itu sendiri dan bukannya kerugian perayu-perayu. Maka kerugian yang dituntut adalah di luar duga dan kerana itu tidak boleh diperolehi oleh perayu-perayu.

(2) Bagi maksud tort pemalsuan jahat, masa mula dikira dari tarikh penyiaran kepalsuan yang dikatakan itu. Di sini, penyiaran dibuat pada 8 Jun 1993 dan dengan itu masa yang dihadkan untuk membawa tindakan akan luput selepas 18 Jun 1999. Begitu juga, tort salahguna proses dilakukan sebaik penyalahgunaan berlaku.

(3) Terdapat bahan pada rekod yang mengesahkan bahawa perayu-perayu menyedari tentang pengiklanan sejak dari 18 Jun 1993 lagi. Bagaimanapun, tiada carian mengenai proses mahkamah dalam perkara berbangkit telah dibuat oleh mereka. Berdasarkan fakta, masa yang dihadkan bagi mengambil tindakan akan luput selepas 18 Jun 1999. Walaupun begitu writ hanya difailkan pada 27 Jun 2003. Oleh itu, kedua-dua tindakan tort di sini telah dihalang oleh had masa.

Case(s) referred to:

Attorney General of the Duchy of Lancaster v. London and North Western Rly Co [1892] 3 Ch 274 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cornwall Gardens PTE Limited v. RO Garrard and Company Limited [2001] EWCA Civ 699 ***(refd)***

Johnson v. Gore Wood & Co (a firm) [2002] 2 AC 1 ***(refd)***

Lee v. Sheard [1955] 1 QB 192 ***(refd)***

Macaura v. Northern Assurance Co Ltd [1925] AC 619 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

For the appellants - Paul Kwong (Toh Chia Hua with him); M/s Azman Davidson & Co

For the respondent - Porres Royan (T Sudhar with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-852-2003]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellants (plaintiffs in the court below) are husband and wife. They are the directors of a company called Sri Palmar Development & Construction Sdn Bhd or Sri Palmar for short. They, together with another person are also shareholders of Sri

Palmar. The appellants owned a property. It was their home. They charged it to the respondent bank (defendant in the court below) to secure a loan to Sri Palmar. They also executed a guarantee. There was default in making payment. So, the bank enforced the securities as it was entitled to do. The property was sold pursuant to an order for sale and the appellants moved away. There was a shortfall. The bank therefore instituted proceedings and obtained judgment against the appellants. It then commenced bankruptcy proceedings. And this is where the present story really begins.

[2] The bank caused to be issued a bankruptcy notice against the appellants. It took out a summons for an order to have the bankruptcy notice served by substituted service, that is to say, by advertising the notice in the newspapers. The affidavit in support alleged that service had been attempted at the address of the charged property. That was the address for service alleged in the statement of claim and admitted to be so in the appellants defence filed in the action upon the guarantee. However, the appellants' contend that the bank did not reveal the fact that the property (ie, the address for service) had been sold and that the appellants were no longer there; both facts well within the bank's knowledge. The appellants' complaint is that the bank also had in its possession other addresses at which the appellants could be reached. But no attempt had been made to effect personal service at these. Accordingly, by relying on a false affidavit, the bank induced the court to make the order for substituted service. The notice was duly published in the newspapers. The appellants' case is that they are the victims of the torts of abuse of process and of malicious falsehood. They filed an action claiming damages from the bank. The allegation is that the appellants had suffered damage because they and Sri Palmar had been blacklisted by banks in consequence of which Sri Palmar had been unable to obtain finance. The bank applied to have the suit struck out on two grounds. First, because the appellants lacked standing to sue because the damage, if any, was suffered by Sri Palmar and not the appellants. Second, because the action was barred by limitation. The High Court acceded and struck out the action. The present appeal is directed against that decision.

[3] I will take each point in turn. As for the appellants' ability to recover the damage they claim, it is clear from paras 11.4, 11.6 to 11.12A and 11.15 of the amended statement of claim that the damage they allege was suffered by Sri Palmar. Going by first principles of company law, Sri Palmar's loss is not that of the appellants. See, *Macaura v. Northern Assurance Co Ltd* [1925] AC 619. But, says Mr Kwong of counsel for the appellants, the general principle is ousted in the present case. He relies on the decision of the English Court of Appeal in *Lee v. Sheard* [1955] 1 QB 192 where the facts were these. The plaintiff who was one of two directors of a private company in which he held 49% of the share capital suffered injuries as a result of a motor accident. He had taken an active part in the business of the company. He was unable to attend to his work and in his absence there was a substantial diminution of turnover and profits of the company which resulted in the plaintiff receiving lower profits from the company. One of the heads claimed by the plaintiff as damages was the diminution of the distribution received by him from the company. The defendant argued that the claim was too remote in law because it was the company that suffered the loss and not the plaintiff. That defence failed and the plaintiff succeeded both at trial and on appeal. In *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, Lord Bingham stated the applicable principles in the following terms:

> (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v. Sheard* [1956] 1 QB 192, 195-196, *George Fischer (George Fischer (Great Britain) Ltd v. Multi Construction Ltd* [1995] 1 BCLC 260) and *Gerber (Gerber Garment Technology Inc v. Lectra Systems Ltd* [1997] RPC 443).
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> (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v. Sheard*, at pp 195-196, Heron International, (*Heron International Ltd v. Lord Grade* [1983] BCLC 244), particularly at p 262, *R.P. Howard* (*Howard (R P) Ltd v. Woodman Matthews & Co* [1983] BCLC 117), particularly at p 123, *Gerber and Stein v. Blake* (*Stein v. Blake* [1998] 1 All ER 724), particularly at p 726.

[4] It is clear from proposition (2) that in the fact pattern there postulated, a shareholder may only sue if he has a cause of action independent from any that his company may have. In other words, for the principle in *Lee v. Sheard*, George Fischer and Gerber to apply, the shareholder must in the first place have suffered a separate loss. For example, in *Lee v. Sheard*, Lee was able to recover because it was the defendant's tort that made it impossible for Lee to attend to the affairs of the company of which he was an active director resulting in lower profits for him. So too, for proposition (3) to apply, a shareholder must suffer a loss separate and distinct from that suffered by the company caused by the defendant's breach of a duty independently owed to the shareholder. Once again, the facts of *Lee v. Sheard* amply illustrate the point.

[5] In my considered judgment, propositions (2) and (3) do not apply here because no wrong was done by the bank to the appellants which adversely impacted upon their returns from Sri Palmar. It is not the appellants' case that Sri Palmar was making profits before the obtaining of the substituted service order and publication of the bankruptcy notice in question and that it suffered losses after these events. The loss identified in the statement of claim is purely an inability on the part of Sri Palmar to undertake a certain project for want of finance resulting in a loss. Based on well established principles, the "loss" suffered by Sri Palmar in the present instance is its loss and not the appellants' loss. Accordingly, I am in agreement with the submission of the respondent's counsel that on the face of the pleadings, the loss claimed is too remote and as such irrecoverable by the plaintiffs

[6] With that I turn to the issue of limitation. It is beyond argument that for the purposes of the tort of malicious falsehood, time begins to run from the date of the publication of the falsehood. See, *Cornwall Gardens PTE Limited v. RO Garrard and Company Limited* [2001] EWCA Civ 699 and the cases cited therein. Here, publication took place on 8 June 1993. Accordingly, the time limited to bring an action expired not later than 8 June 1999. Similarly, it is my judgment that the tort of abuse of process is committed when the abuse takes place. There is material on record that confirms that the appellants were aware of the advertisements as long ago as 18 June 1993. Yet they did not make a search of the court file until much later to discover the

order of substituted service complained of and the material on which it was based. For present purposes, I assume, without deciding, that there was an abuse of the court's process in the present instance. The time limited to bring an action based on the tort would on the facts here have expired not later than 18 June 1999. Yet the writ was only filed on 27 June 2003. The action in respect of both torts was therefore time barred.

[7] It is well settled that the summary jurisdiction of the court to enter judgment or to strike out a pleading must only be exercised in plain and obvious cases. See *Attorney General of the Duchy of Lancaster v. London and North Western Rly Co.* [1892] 3 Ch 274; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7. There must be no triable issues, whether of law or fact so that a case for the exercise of the summary jurisdiction must be made out beyond a reasonable doubt: *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182. Applying these time honoured tests to the present case, I am left in no doubt whatsoever that the learned judge was entirely correct in striking out the appellants' suit. I would therefore dismiss this appeal. The appellants must pay the costs of this appeal to the respondent. The deposit in court shall be paid out to the respondent to account of its taxed costs. The orders of the High Court are hereby affirmed.

[8] My learned brothers Raus Sharif and Sulong Matjeraie, JJCA have seen this judgment in draft and have expressed their agreement with it.